

(1982) 05 CAL CK 0013
In the Calcutta High Court

Case No : Income-tax Reference No"s. 340 to 344 of 1969

Commissioner of Income Tax

APPELLANT

Vs

Bharat Luxmi Co. Ltd.

RESPONDENT

Date of Decision : 24-05-1982

Acts Referred:

Income Tax Act, 1922 — Section 34, 34(1)(b), 66(2)

Citation : (1983) 32 CTR 57 : (1983) 142 ITR 624 : (1983) 14 TAXMAN 424

Hon'ble Judges : Suhas Chandra Sen, J;Sabyasachi Mukharji, J

Bench : Division Bench

Advocate : Ajit Sengupta and R.C. Prosad, for the Appellant;

Judgement

Sabyasachi Mukharji, J.—In this reference u/s 66(2) of the Indian I.T. Act, 1922, as directed by this court, the Tribunal has referred the following questions to this court :

1957-58 :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the sum of rupees one lakh thirty thousand and five hundred was not a capital loss ?"

1958-59 :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the sum of Rs. 4,04,360 was not a capital loss ?"

1959-60 :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the sum of Rs. 1,34,680 was not a capital loss ?"

1960-61 :

"Whether, on the facts and in the circumstances of the case, the Tribunal was

right in holding that the assessee was entitled to the carry forward of losses of the assessment years 1957-58 to 1959-60 ?",

1961-62 :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessee was entitled to the carry forward of losses of the assessment years 1957-58 to 1959-60 ?"

2. This reference relates to the assessment years 1957-58 to 1961-62. The corresponding previous years were the years ending on the 30th April, 1956, 1957, 1958, 1959 and 1960 respectively. The assessee is Bharat Luxmi Company Ltd. It is a company which is a dealer in shares. This finding of fact has not been challenged. For the assessment year 1957-58 the assessee claimed to have incurred a loss of Rs. 2,67,727 in share dealings. This amount included a loss of Rs. 1,30,500 resulting from the revaluation of the shares of the India Jute Company Ltd. (hereinafter referred to as "the India Jute Mills"), as on the close of the accounting year. The ITO originally completed the assessment for the year accepting the assessee's claim of the loss. Subsequently in the course of the assessment proceedings for the year 1958-59 the ITO came into possession of a letter dated the 24th April, 1956, written by Shri C. L. Bajoria (hereinafter referred to as "Bajoria") to Mackinnon Mackenzie & Co. Ltd. Bajoria is the brother-in-law of one S. L. Kanoria, a director of the assessee-company, who along with his son, S. K. Kanoria, held 22,000 out of 25,200 shares in the assessee-company. Mackinnon Mackenzie & Co. Ltd. were the managing agents of India Jute Mills on the 1st April, 1956. The aforesaid letter dated the 24th April, 1956, placed on record an agreement which was to take effect from the 1st of April, 1956, and the following was an extract of the relevant portion from the letter :

"I refer you to the correspondence ending with my letter dated the 11th March, 1955, in relation to the above mill and to my discussions with Lord Inchcape and Mr. Muir and write to place on record the following agreement that was then arrived at.

(1) Mackinnon Mackenzie & Co. Ltd. will tender their resignation as managing agents of the India Jute Mills Co. Ltd. and Megna Mills Co. Ltd. as on the 31st March, 1956.

(2) The head office,....staff, presently employed by Mackinnon Mackenzie Ltd. will be offered employment by the mills.....on exactly the same terms.

(3) On the same being tendered to me on any date subsequent to the 31st March, 1956, I will purchase 13,244 ordinary shares and 30,000 deferred shares in the India Jute Co. Ltd. presently owned by Mackinnon Mackenzie & Co. Ltd., the price, as then agreed, being Rs. 225 per ordinary share and dividend for the half year ending the 31st March, 1956. Without in any way derogating from any liability for payment of such shares against delivery of scrip, I shall be entitled to

make arrangements for any portion of such shares to be purchased by business friends.....

(5) It was also agreed.....that in the event of Mackinnon Mackenzie & Co. Ltd. deciding to sell the balance of its 4,106 shares outside his own group they would be offered to and purchased by me at Rs. 230 per share."

3. It was mentioned that the issued and fully paid up shares of the India Jute Mills consisted of 69,000 shares of Rs. 125 each and 30,000 deferred shares of rupee 1 each. On the 1st April, 1956, Mackinnon Mackenzie & Co. Ltd. ceased to be the managing agents of the India Jute Mills which became a director-controlled company. The assessee had decided to purchase 6,000 shares of the India Jute Mills and requested Bajoria to secure these shares for it. By a letter dated the 12th March, 1955, the assessee confirmed the purchase and the terms of delivery. The assessee relied on a letter of C. L. Bajoria to S. L. Kanoria on the 11th March, 1955, which contained the following I

"With reference to our discussion and as desired by you, I am glad to inform you that in my negotiations with Lord Inchcape, I have been able to secure for your company 5,744 ordinary shares in India Jute Co. Ltd. @ Rs. 225. Delivery of all these shares will be effected after 31st March, 1956.

Please let me have your confirmation of the said transaction."

4. The assessee's capital was only, as mentioned hereinbefore, Rs. 25,200 and it did not have adequate funds to make the purchases. It, however, secured the bank overdraft on the security of these and other shares and borrowed the rest, namely, Rs. 5,80,000.

5. The shares purchased were delivered by the brokers to the assessee in 1956. In the accounting period relevant to the assessment year 1957-58, 1,500 shares were purchased on the 28th April, 1956. They remained in closing stock at the end of the accounting year and were valued at Rs. 138 per share on the 30th April, 1956, at the market price and loss of Rs, 1,30,500 was claimed on such revaluation. During the accounting year relevant to the assessment year 1958-59 the balance of the shares were acquired. There were some sales in that year and the closing stock as on the 30th April, 1957, was valued at Rs. 123 per share and as a result a loss of Rs, 4,04,360 was claimed for the assessment year 1958-59. The stocks brought over in the assessment year 1959-60 were sold in that year and a loss of Rs. 1,34,680 was claimed for this year.

6. Having regard to the close relationship of Bajoria and the director of the assessee-company the ITO was of the view that the shares had not been acquired by the assessee as stock-in-trade in the normal course of business of share dealing and had been purchased as part of the scheme to secure Bajoria's controlling interest over the India Jute Mills. He, therefore, considered that the loss claimed in respect of these shares would not be a genuine and ordinary commercial loss. He, therefore, initiated proceedings u/s 34(1)(b) of the Indian

I.T. Act, 1922, to reopen the assessment for the assessment year 1957-58. The assessee claimed a loss of Rs. 1,30,500 on revaluation for the assessment year 1957-58, a loss of Rs. 4,04,360 on sale and revaluation of closing stock for the assessment year 1958-59 and a loss of Rs. 1,34,680 on the sale for the assessment year 1959-60. The losses were carried over and set-off was claimed in the assessment years 1960-61 and 1961-62. The ITO disallowed the claims. In the reassessment made by him u/s 34 of the Indian I.T. Act, 1922, for the assessment year 1957-58 the ITO included the sum of Rs. 1,30,500 which was allowed as a loss in the original assessment. The claim of loss for Rs. 4,04,360 for the assessment year 1958-59 and Rs. 1,34,680 for the assessment year 1959-60 was disallowed by him. He, therefore, disallowed also the claim for carry forward and set-off of the losses in the assessment years 1960-61 and 1961-62.

7. Against the aforesaid order the assessee went up in appeal before the AAC. In his consolidated order relating to these appeals, the AAC dismissed the appeal in respect of the assessment year 1957-58 and although he allowed certain claims on other points for the assessment years 1958-59 to 1961-62, he rejected the assessee's claim for the losses in respect of the India Jute Mills' shares for the assessment years 1958-59 and 1959-60 and the carry forward of the losses in the assessment years 1960-61 and 1961-62.

8. Being aggrieved with the aforesaid order, the assessee went up in appeal before the Tribunal. The Tribunal in its order observed, inter alia, as follows :

"The assessee next appealed before the Tribunal. The Tribunal considered that in arriving at a conclusion in this case, it was necessary to remind itself that the assessee was a share dealer and that the shares acquired by the assessee would form part of its stock-in-trade and that the assessee would be entitled to the claim of loss on valuation and sale unless, (i) it was proved that the purchase and sale were not in the ordinary course of its business, and/or (ii) it was shown that these particular shares were acquired by way of capital investments. The reasons why the Income Tax Officer had considered the transactions to be outside the pale of the assessee's business were found to be :

(i) The assessee's connection with Bajoria and the clear intention to help Bajoria in his deal with the India Jute Mills;

(ii) The conclusion of the Income Tax Officer that the shares were purchased in 1956 for Rs. 225 when the market value was only Rs. 138 or thereabout;

(iii) The fact of the assessee's having purchased these shares by heavy borrowals out of all proportion to its capital; and

(iv) The sales being to other relatives and associates of Bajoria.

9. In regard to the second reason above, the Tribunal found that the letter of Bajoria to Mackinnon Mackenzie & Co. Ltd., on the basis of which the assessment for 1957-58 was reopened and on which the Income Tax Officer had relied for his conclusion itself made it clear that there were not only negotiations between

Bajoria and the India Jute Mills in 1955 but that even at the time the idea was that the shares should be taken by Bajoria or his friends and associates. The genuineness of the letter or the recital therein purporting to record an agreement arrived at in March, 1955, and reference to earlier correspondence of 1955 had not been doubted nor could that be doubted without an examination of Mackinnon Mackenzie and Co. Ltd., in the matter. The Tribunal held that there were no grounds to refuse to accept the assessee's version that the negotiations to purchase the shares had been put through in 1955 but the change-over was contemplated only in 1956 and, as such, the shares were to be delivered only in 1956. The ruling market price as in March, 1955, being admittedly Rs. 230, there was, according to the Tribunal, no reason to consider the purchase price of the shares as much above market rates and hence suspicious. The Tribunal considered the third reason of the Income Tax Officer as not of much significance either way and gave reasons in paragraph 12 of its order.

10. Dealing with the first and fourth reasons together, concerning the impact of the relationship between the parties on the commercial nature of the transaction, the Tribunal found it difficult to draw from the given facts the inference that the transaction was not one in the ordinary course of business. Looking into the particular items of sale the Tribunal found it immaterial that the sales were to closely allied persons or concerns.

11. Proceeding on the assumption that the shares were purchased in order to help Bajoria in some scheme of his, the Tribunal considered that, so far as the assessee was concerned, all that was material was that it intended to purchase and dispose of the shares and so long as the purchase prices were not inflated and the sale prices were not below the market rate, the transactions were within the fold of the assessee's business and that the intention to help out Bajoria was irrelevant in considering the assessability of the profits or allowability of the losses in the transaction. According to the Tribunal so long as the transaction had been actually put through the assessee would be entitled to claim the losses, just as it might have been assessable had there been profit. The Tribunal found that the shares were purchased at the market value (not at inflated rates) on borrowed money, held for a very short while and then disposed of and having regard to the fact that the assessee was a dealer in shares it found it difficult to escape the conclusion that the losses were revenue and not capital losses. The Tribunal held that the assessee was entitled to succeed in its claim of losses for the assessment years 1957-58 to 1959-60 and, consequently, for the carry forward of these losses in 1960-61 and 1961-62."

12. On these facts the questions have been referred to. It has to be borne in mind that the assessee is a dealer in shares. The Tribunal has correctly stated that the assessee was a dealer in shares and naturally the shares acquired by the assessee in the course of its business would form part of its stock-in-trade unless it was proved that the purchase and sales were not in the ordinary course of its business or it was shown that these particular shares were acquired by way of

capital investment. From the facts set out hereinbefore it appears to us that the relevant facts on this aspect had been duly considered by the Tribunal. The Tribunal considered the nature of the transaction, the purchase prices and the sale prices. On the basis of the finding of facts the Tribunal has rightly come to the conclusion that the losses were allowable for the relevant years and for the next two years they were entitled to be carried over. It appears to us that the Tribunal had borne in mind the relevant principles of law and the findings of fact being its basis, in our opinion, the conclusion of the Tribunal in this case cannot be assailed.

13. In that view of the matter we answer question No. 1 for the assessment year 1957-58 in the affirmative and in favour of the assessee. For the assessment year 1958-59 similarly the question is answered in the affirmative and in favour of the assessee. For the third assessment year 1959-60 the question will be answered in the affirmative and in favour of the assessee. In view of the findings made above, the questions for the assessment years 1960-61 and 1961-62 must be answered in the affirmative and in favour of the assessee. All the questions are answered in the affirmative and in favour of the assessee.

14. In the facts and circumstances of the case, parties will pay and bear their own costs.

Suhas Chandra Sen, J.

15. I agree.